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Supreme Court of the United States

OCTOBER TERM, 1966

No. 399

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKHARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF FOR PETITIONERS

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Respondent's brief (p. 27) seeks to overcome the contention that petitioners were convicted of offenses not charged in the complaint by reference to the time—4:25 P. M.—set forth in the complaint. The argument is that this should have alerted defendants to the fact that they were being charged with the various disorderly acts committed after the order to disperse, not merely with refusal to obey that order. We submit that the contention is without merit.

In the first place, the complaint (R. 1) gives no hint that any of those disorderly acts were charged. There is no reference to lying down in the street, hitting a horse, or any of the matters dwelt on in the opinion of the Appellate Term (R. 296, 97). On the contrary, the whole impact is

that the police ordered the meeting broken up because it was then already unlawful.

In any event, however, it is well settled law in New York that the precise time charged is not binding on the prosecution so that proof of the commission of the crime at a different time is not a variance.

As Chief Judge Conway said in *People* v. *La Marca*, 3 N. Y. 2d 452 (cert. denied 355 U. S. 920), at 458:

> "It is well settled that except where time is a material ingredient of the crime the prosecution is not confined in its evidence to the precise date laid in the indictment, but may prove that the offense was committed at any time prior to the commencement of the prosecution and such proof does not constitute a material variance (Code Crim. Pro., § 280; *People* v. *Jackson*, 111 N. Y. 362, 369; *People* v. *Krank*, 110 N. Y. 488, 492; 42 C. J. S., Indictments and Informations, § 257, p. 1277; 27 Am. Jur., Indictments and Informations, §§ 70-72, pp. 633-635). * * *

Cf. *People ex rel. Miller* v. *Hoy*, 232 N. Y. Supp. 2d 134.

There can be no contention here that the precise time of the offense was an ingredient of the crime. Therefore the reference in the complaint to 4:25 P. M. had no significance whatever.

Respectfully submitted,

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